**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF IOWA**
**WESTERN DIVISION**

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| SHERRY BEAVER,<br>Plaintiff,<br>vs.<br>EARTHGRAINS BAKING COMPANIES, INC.,<br>Defendant. | No. C 01-4054-MWB<br><br>**MEMORANDUM OPINION AND ORDER REGARDING PLAINTIFF'S MOTION TO REMAND** |

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This action, which alleges breach of a contract to pay severance benefits, was originally filed in Iowa state court. However, the defendant removed this action to this federal court asserting that the plaintiff's breach-of-contract claim is preempted by the Employee Retirement Income Security Act of 1974 (ERISA), as amended,

29 U.S.C. § 1001 *et seq*. The plaintiff has now moved to remand this action to state court on the ground that the severance plan in question is not covered by ERISA.

## *I. INTRODUCTION*

Plaintiff Sherry Beaver filed this action in the Iowa District Court for Woodbury County, Associate Division, on May 7, 2001, alleging that defendant Earthgrains Baking Companies, Inc. (Earthgrains), which had acquired Beaver's employer, Metz Baking Company (Metz), on March 15, 2000, breached an agreement to extend the Metz Baking Company severance package to her as part of a "retention agreement" intended to keep employees through the transition in ownership of Metz. More specifically, Beaver alleges that, on March 20, 2000, Earthgrains provided her with a Retention of Employment document, *see* Petition, Exhibit 1, offering to retain her employment effective as of the closing date of Earthgrains's acquisition of Metz. The Retention of Employment document included the following provision regarding severance packages:

> ! **Severance Payment** - Your severance package will be extended so that its effective date will coincide with the end of your retention period.

*Id.* at 2. Beaver alleges that she was advised that she must reply to the retention offer within three business days after receiving it. She also alleges that she had a meeting with representatives of Earthgrains on March 20, 2000, to discuss the extension of severance benefits, during which she was advised that if she quit at any time, she would be eligible to receive severance benefits. She alleges that on March 23, 2000, she and other employees received an e-mail from Earthgrains stating, "[I]f during the course of your retention period you voluntarily resign, you will still receive your severance benefits under the METZ policy." Petition, ¶ 12; Exhibit 2. Beaver contends that, in reliance on these representations from Earthgrains, she notified Earthgrains that she was accepting the terms of the retention offer.

However, Beaver alleges that, on March 29, 2000, Earthgrains called a meeting to advise her and other employees that Earthgrains was rescinding the retention agreement. At that meeting, Beaver also alleges that she and other employees received a letter from Earthgrains stating that an employee would not be eligible to collect severance pay if the employee declined the retention offer; rather, the employee must remain employed until such time as he or she was released from employment with Earthgrains. Beaver alleges further that, on March 31, 2000, Earthgrains honored its original retention offer and verbal communications regarding severance eligibility as to two employees who had resigned, but refused to honor Beaver's May 17, 2000, request that Earthgrains honor the retention agreement as to her. Beaver therefore alleges that Earthgrains has breached its contract to pay severance benefits.

On May 31, 2001, Earthgrains removed this action to this federal court pursuant to 28 U.S.C. §§ 1441 and 1446, alleging that Beaver's petition purports to state a cause of action for severance pay benefits, which are benefits under ERISA. Earthgrains alleges that this action is consequently one over which this court would have "federal question" jurisdiction pursuant to 28 U.S.C. § 1331, and that being so, the action is removable to federal court. On May 31, 2001, Earthgrains also filed its answer to Beaver's petition in this court, denying Beaver's claim of breach of contract to pay severance benefits and asserting, as an affirmative defense, that Beaver's claim is governed by ERISA and that Beaver has no right to benefits under ERISA, in that the benefit plan was not vested and could be changed at any time.

On June 27, 2001, Beaver moved to remand this action to state court, on the ground that the severance benefits at issue are not covered by ERISA and that her contention that they are not is supported by case authority. After an extension of time to do so, Earthgrains resisted Beaver's motion to remand on July 23, 2001, reiterating and developing its contention that the severance plan in question here is indeed governed by ERISA, so that the

action has been properly removed on the basis of federal question jurisdiction.

## *II. LEGAL ANALYSIS*

### *A. "Federal Question" Removal*

#### *1. The "well-pleaded complaint" rule*

As the Eighth Circuit Court of Appeals recently explained,

> Federal district courts may exercise removal jurisdiction only where they would have had original jurisdiction had the suit initially been filed in federal court. *See* 28 U.S.C. § 1441(b). Removal based on federal question jurisdiction, as in this case, is generally governed by the "well-pleaded complaint" rule, which provides that federal jurisdiction exists only where a federal question is presented on the face of the plaintiff's properly pleaded complaint. *See Magee v. Exxon Corp.*, 135 F.3d 599, 601 (8th Cir. 1998).

*Krispin v. May Dep't Stores Co.*, 218 F.3d 919, 922 (8th Cir. 2000); *see also Gore v. Trans World Airlines*, 210 F.3d 944, 948 (8th Cir. 2000) (also stating the "well-pleaded complaint rule" for determination of removal on the basis of federal question jurisdiction), *cert. denied*, ___ U.S. ___, 121 S. Ct. 1358 (2001). Plainly, there is no mention of ERISA on the face of Beaver's state-court petition, nor any allegation of any claim other than a state-law breach-of-contract claim.

Generally, "[a] defendant is not permitted to inject a federal question into an otherwise state-law claim and thereby transform the action into one arising under federal law." *Gore*, 210 F.3d at 948. As the court explained in *Gore*,

> "Congress has long since decided that federal defenses do not provide a basis for removal." [*Caterpillar, Inc. v. Williams*, 482 U.S. 386,] 399, 107 S. Ct. 2425 [(1987)]. "Thus, a case may not be removed to federal court on the basis of a federal defense, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Rivet v. Regions Bank*

> *of Louisiana*, 522 U.S. 470, 475, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998) (internal quotations and alterations omitted). To permit removal on the basis of a federal defense would deprive the plaintiff of the right to be the master of his cause of action. *See Caterpillar Inc.*, 482 U.S. at 399, 107 S. Ct. 2425.

*Gore*, 210 F.3d at 948-49. Thus, even though Earthgrains asserts a federal defense—the applicability of ERISA to the severance plan in question and the lack of "vesting" of the plan under ERISA—that federal defense does not necessarily establish that this action is removable.

***2. The "complete preemption" exception***

However, the Eighth Circuit Court of Appeals has recognized that there is "a narrow exception to this general rule" that removability based on federal question jurisdiction must appear on the face of the well-pleaded complaint. *Krispin*, 218 F.3d at 922; *Gore*, 210 F.3d at 949 (describing this exception as "an independent corollary to the well-pleaded complaint rule"). That exception "is the doctrine of 'complete preemption,' under which the preemptive force of certain federal statutes is deemed so 'extraordinary' as to convert complaints purportedly based on the preempted state law into complaints stating federal claims from their inception." *Id.* at 922 (citing *Caterpillar, Inc.*, 482 U.S. at 393, and *Magee*, 135 F.3d at 601); *Gore*, 210 F.3d at 949. "Whether federal law preempts a state-law cause of action is a question of congressional intent." *Gore*, 210 F.3d at 949.

ERISA preemption is an example of the applicability of the "complete preemption doctrine" of removability:

> ERISA is a comprehensive statute designed to promote the interests of employees by regulating the creation and administration of employee benefit plans. Consistent with the decision to create a comprehensive, uniform federal scheme, Congress drafted ERISA's preemption clause in broad terms. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-38, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990) ("deliberately expansive language was designed to establish pension plan

> regulation as exclusively a federal concern"). Congress preempted "all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The United States Supreme Court has concluded that suits under section 502(a) of ERISA [29 U.S.C. § 1132(a)] present a federal question for purposes of federal court jurisdiction. *See [Metropolitan Life Ins. Co. v.] Taylor*, 481 U.S. [58,] 66, 107 S. Ct. 1542 [(1987)]. *Causes of action within the scope of, or that relate to, the civil enforcement provisions of 502(a) are removeable to federal court despite the fact the claims are couched in terms of state law. See id.*; *Kuhl v. Lincoln Nat'l Health Plan of Kansas City, Inc.*, 999 F.2d 298, 302 (8th Cir. 1993); *Rice [v. Panchal]*, 65 F.3d [637,] 641 [(8th Cir. 1995)]. Not only does this complete preemption confer federal jurisdiction, it also limits claims and remedies exclusively to those provided by section 502(a). *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987); *Kuhl*, 999 F.2d at 302.

*Hull v. Fallon*, 188 F.3d 939, 942 (8th Cir. 1999) (emphasis added), *cert. denied*, 528 U.S. 1189 (2000). As to whether or not ERISA preemption allows removal in a particular case, the Eighth Circuit Court of Appeals has also explained,

> The issue of jurisdiction in the district court is a question we review de novo. *See Wilson v. Zoellner*, 114 F.3d 713, 715 (8th Cir. 1997). Factual determinations made by the district court in addressing the jurisdictional question are reviewed for plain error. *See Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990).

*Hull*, 188 F.3d at 942. The court turns to that question now.

### ***B. Applicability Of ERISA To Severance Plans***

Section 502(a) of ERISA, 29 U.S.C. § 1132(a), in part, "empowers 'a participant or beneficiary' of an ERISA plan to bring a civil action 'to recover benefits due to him under the terms of his plan.'" *Emmenegger v. Bull Moose Tube Co.*, 197 F.3d 929, 931 (8th

Cir. 1991) (quoting 29 U.S.C. § 1132(a)(1)(B)). "A 'plan' is defined as 'an employee welfare benefit plan or an employee pension benefit plan or a plan which is both.'" *Id.* (quoting 29 U.S.C. § 1002(3)). With this truly unhelpful definition of "plan" in mind, the Eighth Circuit Court of Appeals has explained that, if a party is correct that the severance plan in question is *not* an ERISA employee welfare benefit plan, "there is no federal jurisdiction." *Id.* at 931 (citing *Kulinski v. Medtronic Bio-Medicus, Inc.*, 21 F.3d 254, 256 (8th Cir. 1994)).

Turning to the key jurisdictional question of whether or not a particular severance plan is or is not an ERISA plan, the Eighth Circuit Court of Appeals has provided these more helpful observations:

> An "employee welfare benefit plan" is "any plan, fund, or program . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants," *inter alia*, severance benefits. 29 U.S.C. § 1002(1)(B) (1994); *see also Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 7 n. 5, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987) (explaining how severance benefits come within the definition of an employee welfare benefit plan). But not every policy that provides for the payment of severance benefits is necessarily an ERISA plan. As the Supreme Court has noted, ERISA was intended to provide for the federal regulation of *plans*, not merely *benefits*. *See Fort Halifax*, 482 U.S. at 11, 107 S. Ct. 2211 (discussing ERISA preemption of state law). ERISA will be implicated, then, only if the benefits involved are administered according to a plan of some sort. *In other words, ERISA regulates only those "benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation." Id.*

*Emmenegger*, 197 F.3d at 934 (last emphasis added; previous emphasis in the original).

In *Emmenegger*, as here, the parties disagreed as to whether or not the severance plan at issue required "an ongoing administrative program" sufficient to implicate ERISA and thus to invoke the jurisdiction of the federal courts on the plaintiffs' claims for

severance benefits. *Id.* The court in *Emmenegger* looked for guidance on that question to the Supreme Court's decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987):

> *Fort Halifax* is the seminal Supreme Court case on whether a severance plan is an ERISA-governed welfare benefit plan. The "plan" at issue in that case was a state statute that required employers to make severance-type payments to employees who lost their jobs as the result of a company's shutdown of a facility. A company would make payment—if at all—only once, on the occasion of a shutdown. The Court held that the state statute did not "relate to" an employee benefit plan because there was no ERISA "plan," and therefore the state law was not preempted by ERISA.

*Emmenegger*, 197 F.3d at 934-35; *see also Northwest Airlines, Inc. v. Federal Ins. Co.*, 32 F.3d 349, 354-55 (8th Cir. 1994) (relying on *Fort Halifax* for the standards for determining whether a partnership plan was a "plan" for ERISA purposes); *Kulinski v. Medtronic Bio-Medicus, Inc.*, 21 F.3d 254, 257-58 (8th Cir. 1994) (discussing *Fort Halifax* and its progeny). However, the Eighth Circuit Court of Appeals found that the plan at issue in *Emmenegger* was considerably different:

> Under the BMT severance plan, however, no single event triggers a one-time payment of benefits to all participants. Employees eligible for benefits under BMT's plan might be terminated singly or in groups of indeterminate size. Terminations that qualify employees for severance benefits could take place at any time, and such terminations are likely to recur for as long as BMT has employees. *See Tischmann v. ITT/Sheraton Corp.*, 145 F.3d 561, 566 (2d Cir.), *cert. denied*, 525 U.S. 963, 119 S. Ct. 406, 142 L. Ed. 2d 329 (1998). The severance plan as written contemplates a continuing, albeit possibly sporadic, need for processing requests for benefits and making payments.
>
> Further, benefits are to be paid only to those employees who are not terminated for disciplinary reasons and who also have given excellent service to BMT during their employment. Inquiry obviously is required into both the reason for the

> discharge and the history of the employee's service to BMT, and then judgments must be made. Were there not some discretion to be exercised, it would be unnecessary for the written policy "to serve as a guide to determine severance pay." Severance benefits are not to be awarded automatically and mechanically upon termination; the decision to pay benefits is made on an individual, ongoing basis, after exercising the discretion described in the plan. *See Fontenot v. NL Indus., Inc.*, 953 F.2d 960, 963 (5th Cir. 1992) (noting that "severance plan requires no administrative scheme because those employees included in the plan were to receive benefits upon termination regardless of the reason for termination").

*Emmenegger*, 197 F.3d at 935. The court concluded further that whether or not a plan required "ongoing administration" could be determined on the face of the plan document. *Id*. Although the court noted that case law established that no single factor was determinative on the issue, in light of all of the relevant circumstances, the court concluded that the plan at issue in *Emmenegger* was an employee welfare benefit plan under ERISA, and consequently, the district court properly exercised federal subject matter jurisdiction over the plaintiff's ERISA claim for severance plan benefits. *Id.*

Applying the *Fort Halifax* standard in *Kulinski v. Medtronic Bio-Medicus, Inc.*, 21 F.3d 254 (8th Cir. 1994), the Eighth Circuit Court of Appeals reached the opposite conclusion with regard to whether or not the severance plan at issue was an ERISA plan:

> To determine whether an ERISA plan exists in this case, this Court must ask whether Bio-Medicus's plan to enter into [change-of-control-termination agreements, or CCTAs] with various of its executives required the establishment of a separate, ongoing administrative scheme to administer the promised benefits. The application of this standard to the facts of this case conclusively demonstrates there is no ERISA plan here. Kulinski's agreement with Bio-Medicus provided that he was to receive severance benefits if terminated within one year of a hostile takeover. He also was to receive benefits if, within the same period, he resigned for good reason, and the

> agreement explicitly gave him the unfettered discretion to decide whether good reason existed. Simply put, once a hostile takeover occurred and Kulinski resigned his employment for what he regarded as a good reason, there was nothing for the company to decide, no discretion for it to exercise, and nothing for it to do but write a check. The "plan" contemplated nothing more. Because such a simple mechanical task does not require the establishment of an administrative scheme, Bio-Medicus's plan to provide golden parachutes for its executives was not an ERISA plan.

*Kulinski*, 21 F.3d at 258; *see also Northwest Airlines, Inc.*, 32 F.3d at 355 & n.6 (concluding that a partnership plan was not an ERISA plan under the *Fort Halifax* standard, where the partnership plan required no administrative scheme, as any administration or determination of benefits had to be made when the stock ownership plan was created, and even at that time, the determination of benefits might well be "self-executing," and the plan was, "at most, . . . a promise to create an employee benefit plan").

### *C. The Severance Plan Here*

Despite Beaver's valiant efforts to fit the severance plan at issue here into the *Kulinski* rather than the *Emmenegger* mold, application of the *Fort Halifax* "ongoing administration" standard, as exemplified in *Kulinski* and *Emmenegger*, demonstrates conclusively that there is indeed an ERISA plan here. That conclusion is apparent on the face of the severance plan document. *See Emmenegger*, 197 F.3d at 935 (the applicability of ERISA to a plan could be determined on the face of the plan document).

The "Separation Agreements" portion of the Metz "Policy Statement" provides, in pertinent part, as follows:

> When *case-by-case circumstances dictate*, a separation agreement *may be authorized* between the Company and a terminating employee. . . .

> Any decision to offer a separation agreement by a manager, a supervisor, or the plant HR Department must be made with the concurrence of the General Manager, the related GAO department head, the MBC President and/or CEO. In all instances, following the necessary approvals, the separation letter will be properly drafted by GAO Human Resources following the calculation of all applicable payments to the separating employee; e.g., severance, accrued vacation, MetzFlex cash options. . . .

Petition, Unnumbered Exhibit 4, Metz "Policy Statement," 1-2 (emphasis added). Thus, the plain language of the Metz severance policy establishes the case-by-case nature of the determination of whether or not a particular employee will be offered a separation agreement; several company officers and/or managers must concur in the decision to grant that employee such a separation agreement; and the separation agreement requires the calculation of severance, accrued vacation, and other cash options. *Id.*

Even the provision upon which Beaver relies as establishing the "mechanical" nature of the entitlement to severance benefits under the Metz plan establishes only "*eligibility*," not entitlement to benefits, and establishes that even eligibility is in part determined on the basis of inquiry and the exercise of discretion. While the eligibility requirements include such arguably "mechanical" requirements as whether the employee is "regular, full-time, or part time and non-union," and the timely execution and return of a separation agreement, *see id.* at 2 ("eligibility" requirements (1) and (3)), they also include factors involving at least significant inquiry, if not the exercise of discretion or subjective evaluation, such as whether the separating employee is "cooperative and in good standing" and whether the termination is involuntary or voluntary, and whether the termination occurred prior to or after the offer of separation benefits. *See id.* at 2 ("eligibility" requirement (2)). Even the determination of the years of service for separation benefit eligibility involves at least an administrative inquiry into whether service was "continuous," whether there was any "break-in-service" and its duration, and whether the employee is "actively at work" or

"previously separated," and hence, "the last day actively at work." *See id*. at 3. Finally, the Metz plan provides that only after "1) eligibility is determined, 2) proper approvals have been received, and 3) the separation agreement is finalized" will a letter stating the terms of the separation agreement be delivered to the employee. *Id.* at 4 (emphasis in the original).

Therefore, as in *Emmenegger*, under the Metz "Policy Statement," "no single event triggers a one-time payment of [severance] benefits to all participants." *Emmenegger*, 197 F.3d at 935. Rather, "[e]mployees eligible for benefits under [Metz's] plan might be terminated [or resign] singly or in groups of indeterminate size." *Id.* Moreover, "[t]erminations that qualify employees for severance benefits could take place at any time, and such terminations are likely to recur for as long as [Earthgrains] has employees" subject to the Metz Severance Policy. *Id.* Thus, "[t]he [Metz] severance plan as written contemplates a continuing, albeit possibly sporadic, need for processing requests for benefits and making payments." *Id.*

Furthermore, like the plan at issue in *Emmenegger*, the Metz "Policy Statement" on severance benefits requires various inquiries and the exercise of discretion. *See id.* at 935 (noting that inquiry is required to determine whether or not employees were terminated for disciplinary reasons and whether or not they had given "excellent" service to the company, and then judgments had to be made about whether to extend benefits). As in *Emmenegger*, were there not some discretion to be exercised, it would be unnecessary for the written policy to require "case-by-case" consideration of the circumstances and the approval of officers, managers, and/or supervisors before a separation agreement is even offered to the employee. *See* Metz "Policy Statement" at 1 ("When case-by-case circumstances dictate, a separation agreement may be authorized. . . ."), 1-2 ("any decision to offer a separation agreement by a manager, a supervisor, or the plant HR Department must be made with the concurrence of the General Manager, the related GAO department head, the MBC President

and/or CEO."), 4 (an offer is made only after requirements including "proper approvals" have been met); *and compare Emmenegger*, 197 F.3d at 935 ("Were there not some discretion to be exercised, it would be unnecessary for the written policy 'to serve as a guide to determine severance pay.'"). As in *Emmenegger*, under the Metz plan, "[s]everance benefits are not to be awarded automatically and mechanically upon termination; the decision to pay benefits is made on an individual, ongoing basis, after exercising the discretion described in the plan." *Emmenegger*, 197 F.3d at 935.

In light of the nature of the Metz plan, it is clear that, unlike the severance plan at issue in *Kulinski*, the plan at issue here requires considerably more than the occurrence of a specified event, the exercise of the *participant's* unilateral judgment about whether or not he or she has good reason to terminate employment at that point, and an obligation by the company at that point to do nothing more than write a check. *Compare Kulinski*, 21 F.3d at 258. The payment of severance benefits under the Metz plan is not "a simple mechanical task [that] does not require the establishment of an administrative scheme." *See Kulinski*, 21 F.3d at 258. Rather, "the decision to pay benefits [under the Metz plan] is made on an individual, ongoing basis, after exercising the discretion described in the plan." *See Emmenegger*, 197 F.3d at 935. The cases cited by Beaver, in addition to *Kulinski*, simply do not warrant—let alone compel—a different conclusion. The severance plan here is subject to ERISA.

## *III. CONCLUSION*

Because of the inescapable conclusion that the severance plan in this case requires "ongoing administration," the plan at issue is governed by ERISA, and this court consequently has jurisdiction over this action. *See Emmenegger*, 197 F.3d at 931. In these

circumstances, the action was properly removed and the plaintiff's motion to remand must be, and hereby is, **denied**.

**IT IS SO ORDERED.**

**DATED** this 21st day of August, 2001.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA